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Supreme Court, U.S.
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No. 97-1222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DON RAY PHINNEY,
PETITIONER,

v.

FIRST AMERICAN NATIONAL BANK AND
FIRST AMERICAN CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in dismissing petitioner Don Ray Phinney's appeal due to lack of jurisdiction because Phinney filed his notice of appeal from the district court's final order 24 days late.

RULE 29.6 STATEMENT

The parent company of respondent First American National Bank is First American Corporation.

Respondent First American Corporation has no parent company.

Respondent First American Corporation has no subsidiaries except those it wholly-owns.

Respondent First American National Bank has the following non-wholly-owned subsidiaries:
The SSI Group, Inc.
IFC Holdings, Inc.

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OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit, concerning which Phinney now seeks a writ of *certiorari*, is unreported. In this order, the Sixth Circuit rejected Phinney's attempt to show why his notice of appeal should be held to be timely, and dismissed Phinney's appeal for lack of jurisdiction. The Sixth Circuit issued the order October 29, 1997, in appeal no. 97-5870. (Pet. App. D; Resp. App. p. 1).

The order of the Court of Appeals for the Sixth Circuit, permitting Phinney to show cause why his appeal should not be dismissed as untimely, is unreported. The Sixth Circuit issued the order August 8, 1997, in appeal no. 97-5870. (Resp. App. p. 3).

The Memorandum and Order of the District Court for the Middle District of Tennessee from which Phinney untimely sought to appeal is unreported. By this Order, the District Court denied Phinney's request for enlargement of time within which to move for reconsideration of an order granting summary judgment to respondents. The district court issued the Memorandum and Order May 8, 1997, in case no. 3-94-0639. (Resp. App. p. 4).

The order of the Court of Appeals for the Sixth Circuit, directing the district court to determine whether an undocketed letter from Phinney to that court, dated April 10, 1997, should be treated as a motion to reconsider or as a request for enlargement of time within which to move for reconsideration, is unreported. The Sixth Circuit issued the order March 28, 1997, in appeal no. 96-6222. (Resp. App. p. 12).

FEDERAL RULES INVOLVED IN THE CASE

Federal Rule of Appellate Procedure 4(a) states in pertinent part:

(a) Appeal in a Civil Case. –

(1) Except as provided in paragraph (a) (4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

Federal Rule of Appellate Procedure 26(b) states in pertinent part:

(b) Enlargement of Time. –

The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

STATEMENT OF THE CASE

After bringing an exhaustive series of lawsuits against respondents First American National Bank and First American Corporation ("First American") over three decades, none of which have been successful, Phinney filed the action which has led to the present petition for *certiorari* on August 3, 1994.

Phinney's animus towards First American stems from his 1968 conviction in Tennessee state court for passing several bad checks to First American National Bank in 1966. His conviction was later reversed on appeal because the statute upon which the indictment was based had been repealed. *State v. Phinney,* Supreme Court of Tennessee, unreported decision dated Sept. 8, 1970.

Phinney filed several actions for malicious prosecution against First American in California and in Tennessee, eventually resulting in a trial in 1978 in the Middle District of Tennessee, presided over by Judge Thomas Wiseman. Prior to trial, Judge Wiseman informed counsel for both parties of certain prior contacts and relationships with First American, and asked if either party objected to his sitting as judge in the case. Neither party objected. On June 1, 1979, Judge Wiseman granted judgement for First American notwithstanding a verdict in favor of Phinney, and the Sixth Circuit affirmed. *Phinney v. First American National Bank,* Sixth Circuit Appeal No. 79-1372, unreported order dated March 18, 1981, Table at 652 F.2d 58 (6th Cir. 1981).

Phinney then sought to vacate Judge Wiseman's judgment, asserting for the first time that Judge Wiseman should have recused himself from the trial *sua sponte.* Judge C.G. Neese denied the motion and the Sixth Circuit affirmed. *Phinney v. First American National Bank,* Sixth Circuit Appeal No. 83-5098, unreported order dated March 12, 1984, Table at 732 F.2d 155 (6th Cir. 1984). Phinney filed a petition for *certiorari*, which this Court denied on October 1, 1984; this Court also denied his petition for reconsideration. *Phinney v. First American National Bank,* 469 U.S. 829, *reh. denied,* 469 U.S. 1067 (1984).

Phinney then complained to the Sixth Circuit, accusing Judge Wiseman of accepting bribes from respondents while the 1978 case was pending. Chief Judge Lively of the Sixth Circuit found Phinney's complaint frivolous and dismissed it. *In re Complaint of Judicial Misconduct,* No. 87-6-372-07 (Aug. 12, 1987). Phinney did not petition the Judicial Council of the Sixth Circuit for review of this dismissal, and Chief Judge Lively's order became final and unreviewable.

Phinney then began a series of lawsuits in federal courts in California, accusing First American of RICO violations for allegedly bribing Judge Wiseman. All these actions were dismissed on numerous separate and independent grounds; however, in one of these actions, Judge J.G. Davies of the Central District of California noted that he could not determine from the face of the complaint alone whether Phinney's action was time-barred. *Phinney v. First American National Bank,* United States District Court for the Central District of California, Case No. CV 92-4823, unreported order dated August 6, 1993. Pet. App. p. 1.

Phinney then filed another RICO action against First American in the Middle District of Tennessee. This case was assigned to Judge Robert L. Echols, who granted First American's Motion for Summary Judgment. *Phinney v. First American National Bank,* United States District Court for the Middle District of Tennessee, Case No. 3:94-0639, unreported order dated March 29, 1996. Pet. App. p. 6. Among the bases for his ruling, Judge Echols found that Phinney's action was time-barred. Judge Echols also granted First American's motion for Rule 11 sanctions based on Phinney's frivolous and vexatious litigations against First American, and prohibited Phinney from filing any further lawsuits against First American arising from the facts alleged to give rise to the asserted bribery and RICO violations. The clerk docketed the order on April 2, 1996, dismissing the complaint.

On April 12, 1996, Judge Echols received a letter from Phinney dated April 10, 1996. On April 22, 1996, Phinney filed a motion for reconsideration, which Judge Echols denied on July 30,

1996. Phinney appealed this order on August 22, 1996 (Sixth Circuit appeal no. 96-6222). On February 3, 1997, the Sixth Circuit noted that Phinney's notice of appeal of the April 2, 1996 dismissal appeared to be untimely, and provided Phinney an opportunity to show cause why his appeal should not be dismissed for lack of jurisdiction. Phinney responded that his April 10 letter was a request for enlargement of time, or a motion for reconsideration.

On March 28, 1997, the Sixth Circuit instructed Judge Echols to determine whether the April 10 letter was a motion for reconsideration of the March 29, 1996 order, or was a request for an enlargement of time within which to file a motion for reconsideration. Resp. App. p. 12.

On May 8, 1997, Judge Echols issued a Memorandum and Order finding that the letter was a request for enlargement of time, and denying the request. Resp. App. p. 4. On September 24, 1997, the Sixth Circuit dismissed appeal no. 96-6222. Phinney did not seek *certiorari* from this dismissal

On July 3, 1997, Phinney filed a notice of appeal of Judge Echols' May 8 Memorandum and Order (Sixth Circuit appeal no. 97-5870). On August 8, the Sixth Circuit, noting that Phinney's notice of *this* appeal also appeared to be untimely, permitted Phinney an opportunity to show cause why his appeal of the May 8 Memorandum and Order should not be dismissed for lack of jurisdiction. Resp. App. p. 3. Phinney responded and argued that Judge Wiseman was a party to the underlying RICO suit, and thus Phinney was permitted 60 days within which to file his notice of appeal.

On October 29, 1997, The Sixth Circuit found that Judge Wiseman was not a party to Phinney's action, ruled that Phinney was not entitled to 60 days within which to file a notice of appeal, and dismissed appeal no. 97-5870 for lack of jurisdiction. Pet. App. p. 30; Resp. App. p. 1. Phinney then filed the instant petition for *certiorari* in this Court.

REASONS FOR DENYING THE WRIT

This Court should deny Don Ray Phinney's petition. It is filled with unsubstantiated and meritless allegations of criminal conduct by several federal district judges and court personnel; Phinney seeks to litigate the merits of actions that have not been considered by the Sixth Circuit Court of Appeals; and he seeks to challenge this Court's denial more than ten years ago of his 1983 petition for *certiorari*. Moreover, Phinney's petition presents no compelling reason for *certiorari* as set forth in Supreme Court Rule 10. Finally, the decision of the court of appeals, dismissing his appeal for lack of jurisdiction, is clearly correct.

I. THE PETITION SEEKS REVIEW OF MATTERS AS TO WHICH THE PETITION IS UNTIMELY, AND DOES NOT SEEK REVIEW OF THE ONLY MATTER AS TO WHICH THE PETITION IS TIMELY

Phinney has asked this Court to issue a writ of *certiorari* to the Sixth Circuit Court of Appeals to review its October 29, 1997, Order finding that it lacked jurisdiction over Phinney's appeal from Judge Echol's decision denying Phinney's April 10 letter request for an enlargement of time within which to move for reconsideration of Judge Echol's decision to grant First American's motion for summary judgment. *See* Pet. App. p. 30; Resp. App. p. 1. This Court has jurisdiction to determine whether the Sixth Circuit lacked jurisdiction over Phinney's appeal, *see Nixon v. Fitzgerald,* 457 U.S. 731, 741-743 (1982), but this Court's jurisdiction is limited to the narrow question of the Sixth Circuit's jurisdiction.

In a case seeking review of a federal circuit court decision, this Court may only obtain jurisdiction on writ of *certiorari* over cases that are "in" the circuit court. *See* 22 *Moore's Federal Practice* § 405.03[1] (Matthew Bender 3d ed., rel. 113-3/97); *United States v. Nixon,* 418 U.S. 683, 690-692 (1974). But the effect of the Sixth Circuit's March 29, 1997, Order was to keep Phinney's case *out* of the Sixth Circuit. Necessarily, therefore, the

matters for which he may seek review are limited to the jurisdictional matters decided by the Sixth Circuit in its March 29, 1997 Order, in which the court dismissed Phinney's appeal because he filed his notice of appeal outside the time permitted by Fed. R. App. P. 4(a).

But Phinney never challenges the correctness of that order in his petition. Phinney does not challenge the correctness of *any* decision of the Sixth Circuit. Instead, he asserts that he "was found innocent" of the 1968 bad check criminal charges, when in fact he was convicted and the conviction was later vacated for procedural error; he charges First American with bribing a music promoter to destroy his supposed country-music singing career; and he seeks review of the propriety of Judge Wiseman's presiding over the 1978 malicious prosecution lawsuit. *See* Petitioner's First Question Presented. But this was the subject matter of Phinney's petition to this Court in 1983, which this Court denied in *Phinney v. First American National Bank*, 469 U.S. 829, *reh. denied*, 469 U.S. 1067 (1984). The fact that this Court ruled on Phinney's 1983 petition, and therefore must have reviewed that petition, also belies Phinney's unsubstantiated charges that First American and/or Judge Wiseman bribed an employee in the Supreme Court clerk's office in 1983 to prevent his 1983 petition for *certiorari* from reaching the chambers of the justices.

Phinney's petition also charges that Judge Wiseman bribed an official of the Judicial Council of the Sixth Circuit to engage in a cover-up and in violations of procedural rules to cause the Judicial Council to reject Phinney's charges that Judge Wiseman had taken bribes from First American. *See* Petitioner's Second Question Presented. To the extent that Phinney revived these issues in the 1994 lawsuit that led to the present petition (which First American does not concede), these matters are not properly before this Court, because these matters have never been before the Sixth Circuit.

Finally, Phinney asks this Court to resolve an alleged difference of opinion between two federal district courts,

concerning whether the statute of limitations barred his complaint. But this matter, too, has never been the subject of a decision by the Sixth Circuit and thus is not properly before this Court.

II. THE ISSUES PRESENTED DO NOT MERIT REVIEW: THERE IS NO CONFLICT AMONG THE CIRCUITS AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Phinney asserts that "the main reason" for granting his petition is to decide which of two district courts is correct concerning the question of whether his RICO suit was timely filed. Petition at 8. He also asks this Court to undertake an internal investigation of alleged misconduct by staff of this Court and of the Sixth Circuit. But these issues are not before the Court. *Supra* at Section I. Even if they were, they do not merit review and do not satisfy the requirements of Rule 10 of this Court: there is no conflict between any of the circuits, nor is there a substantial federal question presented.

III. THE CIRCUIT COURT'S DECISION ON THE MERITS WAS CORRECT

In its October 29, 1997, order, the Sixth Circuit ruled that Phinney was not entitled to a 60-day period within which to file a notice of appeal because no federal official was a party to the action from which Phinney sought to appeal. Phinney argued that Judge Wiseman was a party to the 1994 lawsuit, but the Court of Appeals rejected this assertion, correctly noting that Judge Wiseman was never named as a party. Phinney does not challenge this ruling in the petition. Thus, as the Court of Appeals ruled, Phinney was required to file his notice of appeal within 30 days of the May 8, 1997 ruling by Judge Echols. Fed. R. App. P. 4(a) and 26(a) & (b); *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989). He failed to file within that time. Accordingly, the Sixth Circuit correctly ruled that Phinney's failure to file a timely notice of

appeal prevented the Sixth Circuit from obtaining jurisdiction to review Judge Echols' May 8, 1997, ruling.

CONCLUSION

For the reasons stated, Don Ray Phinney's petition should be denied.

Respectfully Submitted,

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